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December 17, 2007

### VIA ECF

The Honorable Mary Pat Thyng  
United States District Court  
844 North King Street  
Wilmington, DE 19801

Re: *Roquette Freres v. SPI Pharma, Inc., et al.*,  
C.A. No. 06-540-\*\*\*

Dear Magistrate Judge Thyng:

On behalf of defendant SPI Pharma, Inc. ("SPI"), and in advance of the teleconference before Your Honor scheduled for December 19, 2007, we seek the Court's intervention relating to three discovery issues. One issue, raised with the Court previously, relates to location and scheduling of fact witness depositions noticed by SPI. The second issue concerns Roquette's privilege and work product waiver for certain documents listed on its privilege log. The third issue relates to production of the attorney prosecution files for the patent-in-suit and French patent application.

#### **A. The Court Ordered Roquette to Produce Its Witnesses for Deposition in the United States, But Roquette Refuses To Do So In Violation of the Court's Order**

On September 14, 2007, the parties held a telephone hearing with Your Honor to resolve, *inter alia*, a dispute concerning where Roquette should produce its witnesses for deposition. As the Court is aware, Roquette initially refused to produce its witnesses for deposition in the United States and offered them only in Paris, France. At the hearing, the Court directed Roquette's attention to section three, subparagraph (b) in the Court's Scheduling Order dated March 13, 2007. *See* Sept. 14 Transcript (attached hereto as Exhibit A), pp. 19-20. That provision requires that "[a]ny party or representative (officer, director, or managing agent) of a party filing a civil action in this district court must ordinarily be required, upon request, to submit

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to a deposition at a place designated within this district.” *See* Scheduling Order (D.I. 37), 3(b). Contrary to Roquette’s assertion that this provision applies only to Rule 30(b)(6), the Court explained that “...all the depositions are supposed to happen here.” *See* Sept. 14 Transcript, p. 20. The Court made its ruling on the record in clear and unambiguous language, stating “I’m going to be ordering that Roquette produce its people here in the United States.” *See* Sept. 14 Transcript, p. 22.

On October 30, 2007, SPI Pharma noticed the deposition of Mr. Gregory Lebihan, a Roquette employee principally involved in the alleged infringement testing of SPI’s Mannogem EZ, the accused product, for November 27, 2007. Roquette did not reply to several requests to confirm a date for Mr. Lebihan’s deposition. Finally, on November 19, Roquette’s counsel advised SPI’s counsel via email that Mr. Lebihan would not be produced for deposition in the United States. Roquette insisted that it would produce Mr. Lebihan for deposition in the United States on one condition - if he were the only remaining Roquette witness that SPI sought to depose.

On November 21, 2007, SPI noticed the depositions of four additional Roquette witnesses for December 11-13 and 17 and served an amended notice for Mr. Lebihan for December 14th. On the same day, in a separate communication, SPI requested a meet and confer between counsel for early the following week to resolve the issue of deposition scheduling and location. On November 28, Roquette replied and stated that it was available for a meet and confer the following day or day after. On November 29, during the meet and confer, Roquette’s counsel offered to make the noticed witnesses available only in Paris, France or London, England and proposed the week of January 7, 2008. SPI declined to take the depositions in Paris or London and maintained its request that plaintiff Roquette’s witnesses submit to depositions at a mutually agreeable location in the United States.

We view Roquette’s refusal to produce its witnesses in the United States as a willful violation of the Court’s September 14 Order. At every turn, Roquette has frustrated SPI’s efforts to schedule the deposition of Mr. Lebihan. Mr. Lebihan’s deposition and the depositions of the additional witnesses, all Roquette scientists or technicians involved in the testing and development of the alleged invention claimed in the patent-in-suit, must be completed promptly, before initial expert reports are due to be exchanged on January 25, 2008.<sup>1</sup> SPI is a small company and a defendant in this lawsuit. It should not be forced to bear the cost of sending two New York-based attorneys, a court reporter, a videographer, and a French-English interpreter across the ocean to France or England for an entire week. Roquette voluntarily brought suit in Delaware, it has been ordered by the Court to produce its witnesses in the U.S., and its refusal to do so now can only be viewed as an attempt to drive up litigation costs for SPI and further unnecessarily delay the proceedings.

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<sup>1</sup> SPI believes that given the unresolved dispute over the location of the depositions, expert reports may have to be pushed back by a couple of weeks.

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We request that the Court order that all Roquette witnesses be produced for depositions at a mutually agreeable location in the United States.

**B. Roquette Selectively Produced Communications To/From Attorney Bruno Quenon Concerning Alleged Infringement Testing and Therefore Waived Any Privilege Or Work Product Claim For Related Communications**

SPI is seeking immediate production of the following documents identified on Roquette's Index of Privileged Documents (attached hereto as Exhibit B): RF P209-223, RF P226, and RF P233. RF P209 is described on the log as "Memorandum re Roquette/SPI issues." All the other documents are described as "Email re Roquette/SPI issues." These documents all involve communications to/from Mr. Bruno Quenon, who Roquette has identified as a French patent attorney and in-house counsel, and other Roquette employees. No other person identified as an author or recipient on these documents appears to be an attorney, whether a French or U.S.-based attorney. Thus, the only basis for Roquette's assertion of privilege appears to be Mr. Quenon's status as Roquette's in-house counsel.

Roquette already has produced several documents concerning the testing of SPI's accused product, and each bears Mr. Quenon's name and the names of the same correspondents listed on the log for the withheld documents. Roquette should not be allowed selectively to produce communications involving Mr. Quenon, while blocking discovery of other communications concerning the same subject on grounds of privilege or work product. Privilege cannot be used both "as a sword and a shield." *United States v. Nobles*, 422 U.S. 225, 239-240 (1975). Accordingly, we urge the Court to conduct an *in camera* inspection of RF P209-223, RF P226, and RF P 233 and order Roquette to produce them to SPI.

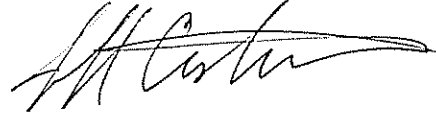
**C. Roquette Should Confirm That It Produced Its Attorney Prosecution Files for the '777 Patent and French Priority Document**

In view of testimony obtained during the depositions of the named inventors of the '777 patent, SPI is preparing to file a motion for leave to amend its answer and counterclaims to add a charge of unenforceability due to inequitable conduct. On December 4, 2007, SPI asked Roquette to produce the attorney prosecution files for the '777 patent and French priority document, which it had asked for previously in its initial document requests dated March 19, 2007. On December 14, Roquette informed SPI that all non-privileged documents regarding French counsel's prosecution of the French priority application and French and U.S. counsel's prosecution of the '777 patent were produced and identified particular bates ranges. However, the bates-ranges identified by Roquette do not necessarily appear to be French and U.S. patent attorney's prosecution files. We respectfully request that the Court require Roquette to confirm that it has produced the requested attorney prosecution files and that all privileged materials withheld from production have been identified on its privilege log.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jeff Castellano', with a long horizontal flourish extending to the right.

Jeffrey T. Castellano (No. 4837)

c: Clerk, U.S. District Court (By Hand Delivery)  
Mary B. Graham, Esq. (By Hand Delivery)  
Julia Heaney, Esq. (By Hand Delivery)  
Douglas V. Rigler, Esq. (By E-mail)

# **EXHIBIT A**

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE

ROQUETTE FRÈRES, CIVIL ACTION  
Plaintiff,  
v.  
SPI PHARMA, INC. and DRYTEC LTD.,  
Defendants. NO. 06-540 (MPT)

Wilmington, Delaware  
Friday, September 14, 2007 at 12:32 p.m.  
TELEPHONE CONFERENCE

BEFORE: HONORABLE MARY PAT THYNGE, Magistrate Judge

APPEARANCES:

MORRIS NICHOLS ARSHT & TUNNELL, LLP  
BY: JULIA HEANEY, ESQ.

and

YOUNG & THOMPSON  
BY: ANDREW J. PATCH, ESQ., and  
JEFFREY R. SNAY, ESQ.  
(Arlington, Virginia)

Counsel for Plaintiff

YOUNG CONAWAY STARGATT & TAYLOR, LLP  
BY: JEFFREY T. CASTELLANO, ESQ.

and

Brian P. Gaffigan  
Registered Merit Reporter

1 MR. B. MURPHY: Your Honor, then I have a  
2 question about that. The protective order requires it.

3 THE COURT: Oh, I couldn't remember if it did.

4 MR. B. MURPHY: No, it does.

5 THE COURT: Okay. Then fine, that person is  
6 identified. I apologize. I couldn't remember if it had  
7 been.

8 MR. B. MURPHY: Yes.

9 THE COURT: I didn't mean to modify the  
10 protective order in that regard.

11 MR. B. MURPHY: Okay.

12 THE COURT: That was my confusion, counsel. I  
13 apologize. Yes. The short answer to it, Julie, is yes, in  
14 light of that.

15 The next issue is whether or not Roquette  
16 should produce the witnesses for deposition in the United  
17 States. And I'm not exactly certain, counsel, based upon  
18 the reading of both parties submissions, whether this was a  
19 misunderstanding between counsel or not.

20 MR. B. MURPHY: Yes, Your Honor. Brian Murphy.  
21 Oren Langer is on a holiday today. I did speak with him.

22 THE COURT: Good for him.

23 MR. B. MURPHY: He is a good man. But I said,  
24 look, here is what is stated in the letter. Did you ever  
25 have a conversation like that with Mr. Rigler? He said

1 never.

2 THE COURT: And Mr. Rigler is not here either.

3 MR. PATCH: That's right. He is traveling as  
4 well, Your Honor.

5 MR. B. MURPHY: So let's just characterize it  
6 as a clear misunderstanding. And let me further say that  
7 taking depositions in France, for anybody who has been  
8 litigating for any period of time, knows that is very, very  
9 inconvenient and difficult because we must, we do not have a  
10 choice, we must get the consent of the French government.  
11 That is in the Hague Convention, and I have had a great deal  
12 of difficulty in my life getting French depositions lined  
13 up, even with the parties consent. We are not permitted to  
14 consent.

15 THE COURT: Well, in light of a matter that  
16 I'm presently considering about certain things regarding  
17 French production of documents, I understand that it can be  
18 a tedious, drawn out, long process, despite the fact that  
19 the French entity has subjected itself to this court's  
20 jurisdiction for enforcement of its patent. And that's  
21 sometimes true of other entities in Europe as well, not just  
22 France, other countries in Europe as well.

23 What do you do about location of depositions,  
24 subparagraph B in the standard scheduling order that I have,  
25 that any party or representative of a party filing a civil



1 action in this District Court must ordinarily be required,  
2 upon request, to submit to a deposition at the place  
3 designated within this District?

4 MR. PATCH: Your Honor, it's Andrew. We think  
5 that would apply clearly to the 30(b)(6) witness for  
6 Roquette. We are trying to figure out what works.

7 THE COURT: Well, the way I look at it, it  
8 doesn't say that it's limited to 30(b)(6). My standard  
9 language also indicates that a defendant who brings an  
10 action or becomes a counterclaimant or cross-claimant; and I  
11 guess to some degree the argument could be made that SPI, by  
12 raising invalidity-type defenses or inequitable conduct or  
13 the such, could fall into that category; are also considered  
14 to have filed the action in this court for the purpose of  
15 this provision. So, technically, all the depositions are  
16 supposed to happen here. I didn't look at it as just only  
17 30(b)(6). I really didn't.

18 MR. PATCH: I kind of did, Your Honor, in that  
19 it says "any party or representative" and then  
20 representative is officer, director or managing agent. It  
21 does seem like it's 30(b)(6).

22 In any case, what we're trying to do is just --

23 THE COURT: Well, the word is "or" not "and."

24 MR. PATCH: Excuse me?

25 THE COURT: The word is "or," not "and."

1 MR. PATCH: Any party "or" representative.

2 THE COURT: Yes.

3 MR. PATCH: Yes. In any event, we're trying to  
4 propose what we thought would work. Roquette is in a small  
5 town in the north of France called Lestrem. We're willing  
6 to bring all the witnesses to Paris, which is a significant  
7 hike from Lestrem and a significantly more convenient  
8 location, for the sake of being able to line them up and get  
9 a time window in the reasonably near future. Doug has been  
10 working on that and he has been working really hard to do  
11 it.

12 To get them all over here is another proposition  
13 entirely. SPI has noticed not only 30(b)(6) depositions  
14 with multiple topics but also three individuals, so we're  
15 talking at least four and probably five or more witnesses.

16 With respect to Brian's comment about conducting  
17 depositions in France, that may or may not be technically  
18 true under the Hague Convention but I mean we did a week or  
19 two of depositions in Paris earlier this summer. It was no  
20 more difficult than scheduling them at any other location.  
21 That is, whether or not this requirement is a letter, it's  
22 not something that is enforced. When the parties agree to  
23 it, they just do it.

24 MR. B. MURPHY: That's not my experience, Your  
25 Honor, one. And, two, I don't understand his whole

1 position. They filed this case as the plaintiff in August  
2 of 2006. Here we are in September of 2007. My client is  
3 trying to get to the bottom of this case in a relatively  
4 inexpensive way, which is not easy given the New York law  
5 firm's rates and they want us to fly to France? They have  
6 got to be out of their mind, Your Honor, to ask for that.

7 THE COURT: Well, I don't consider that they're  
8 out of their minds to ask for that.

9 MR. B. MURPHY: Well --

10 THE COURT: I think their argument is that, as  
11 a matter of convenience to all, you have a central location  
12 for all the witnesses to be taken within hopefully an  
13 abbreviated time frame requiring counsel from both sides of  
14 the fence to go over to France rather than the reverse.

15 However, I'm going to be ordering that Roquette  
16 produce its people here in the United States. And it can  
17 be at a location that is more convenient than Delaware,  
18 certainly.

19 MR. B. MURPHY: We're happy to take them at  
20 counsel's firm, if that is easier. It's all the same to us.

21 THE COURT: Well, I'm ruling that any place in  
22 the United States they can be taken to the extent that it's  
23 more convenient. It's going to be more convenient for some  
24 of the witnesses as to the location; and it could be that  
25 some of these witnesses may be scheduled to come over to the

# **EXHIBIT B**

**ROQUETTE FRÈRES v. SPI PHARMA, INC. et al.**  
U.S.D.C. – D. Delaware C.A. No. 06-540 (\*\*\*)

**Index of Privileged Documents**

<b>Document No.<sup>1</sup></b>	<b>Date</b>	<b>Author(s)</b>	<b>Recipient(s)</b>	<b>Document Description</b>	<b>Basis for Privilege</b>
RF P1-25	09/23/1993	Lèon Mentink	Didier Boulinguez	Facsimile correspondence re patent application.	A/C; WP
RF P26-27	09/23/1993	Lèon Mentink	Didier Boulinguez; Demery	Facsimile correspondence re patent application.	A/C; WP
RF P28-52	09/23/1993	Lèon Mentink	Michel Serpelloni; Philippe LeFevre; Jose Lis; Jean-Jacques Caboche; Jean-Claude Lumaret; Jean-Bernard Leleu; Patrick Haon; Jean-Philippe Boonaert; Jean Schneider; H. Dupas; L. Gavard; Yves Le Bot	Memorandum re patent application.	A/C; WP
RF P53-78		Didier Boulinguez	Lèon Mentink	Memorandum re patent application.	A/C; WP
RF P79-104	09/27/1993	Lèon Mentink	Didier Boulinguez	Letter re patent application.	A/C; WP
RF P105	10/07/1993	Lèon Mentink	Michel Serpelloni; Philippe LeFevre; Jose Lis; Jean-Jacques Caboche; Jean-Claude Lumaret; Jean-Bernard Leleu; Patrick Haon; Jean-Philippe Boonaert; Jean Schneider; H. Dupas; L. Gavard; Yves Le Bot; Pierrick Dufлот; Jean-Paul Salome	Memorandum re patent application.	A/C; WP

<sup>1</sup> All communications to, from and regarding Edward Marschner, attorney for Roquette Freres, are excluded on the basis that they are considered to be governed by Rule 408 of the Federal Rules of Evidence.

**ROQUETTE FRÈRES v. SPI PHARMA, INC. et al.**  
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RF P106-109	08/03/1994	Didier Boulinguez	Lèon Mentink; Jean-Claude Lumaret	Facsimile re patent application.	A/C; WP
RF P110	08/12/1994	Lèon Mentink	Didier Boulinguez; Jean-Claude Lumaret	Telex re patent application.	A/C
RF P111-121	09/07/1994	Lèon Mentink	Didier Boulinguez	Facsimile re patent application.	A/C
RF P122	11/04/1994	Didier Boulinguez	Lèon Mentink; Jean-Claude Lumaret	Facsimile re patent application.	A/C; WP
RF P123-124	03/06/2006	Bruno Quenon	Didier Boulinguez; Veronique Thelliez; Sinniger	Email re Roquette/SPI issues.	A/C
RF P125-129	03/10/2006	Emmanuelle Renard	Bruno Quenon; Veronique Thelliez	Email re Roquette/SPI issues.	A/C; WP
RF P130-133	03/10/2006	Emmanuelle Renard; Didier Boulinguez	Bruno Quenon; Veronique Thelliez	Letter re Roquette/SPI issues.	A/C; WP
RF P134-135	03/23/2006	Bruno Quenon	Patrick Lapointe; Jean-Marc Willefert; Patrick Benet; Veronique Thelliez	Email re meeting with attorney.	A/C
RF P136	03/23/2006	Bruno Quenon	Emmanuelle Renard; Valerie Sinniger; Veronique Thelliez	Email re Roquette/SPI issues.	A/C
RF P137-138	03/23/2006	Emmanuelle Renard	Bruno Quenon; Valerie Sinniger; Veronique Thelliez; Didier Boulinguez	Email re Roquette/SPI issues.	A/C; WP
RF P139-140	03/27/2006	Emmanuelle Renard	Bruno Quenon; Veronique Thelliez; Didier Boulinguez	Email re Roquette/SPI issues.	A/C
RF P141-143	03/27/2006	Emmanuelle Renard	Bruno Quenon; Veronique Thelliez; Didier Boulinguez	Email re Roquette/SPI issues.	A/C; WP
RF P144	04/19/2006	Bruno Quenon	Jean-Marc Willefert; Patrick Lapointe; Patrick Benet;	Email re meeting with attorney.	A/C

A/C = Attorney Client Communication;  
WP = Work Product



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			Dorthee Delmotte		
RF P145	05/03/2006	Bruno Quenon	Andre Trucy; Edouard Roquette; Jean-Marc Willefert; Patrick Lapointe; Patrick Benet; Jacques Pellerin; Jean-Jacques Caboche; Johnny Pallot	Email re meeting with attorney.	A/C
RF P146	05/05/2006	Valerie Sinniger	Bruno Quenon; Veronique Thelliez; Emmanuelle Renard; Didier Boulinguez	Email re Roquette/SPI issues.	A/C
RF P147	05/17/2006	Bruno Quenon	Didier Boulinguez	Email re Roquette/SPI issues.	A/C
RF P148	05/17/2006	Bruno Quenon	Jean-Marc Willefert; Patrick Lapointe; Patrick Benet	Email re discussions with attorney.	A/C; WP
RF P149-150	05/19/2006	Emmanuelle Renard	Bruno Quenon	Email re Roquette/SPI issues.	A/C
RF P151	05/30/2006	Bruno Quenon	Didier Boulinguez; Valerie Sinniger; Veronique Thelliez	Email re Roquette/SPI issues.	A/C
RF P152-160	06/08/2006	Therese-Marie Beaussart-Charlet	Didier Boulinguez	Email re Roquette/SPI issues.	A/C
RF P161-162	07/03/2006	Bruno Quenon	Didier Boulinguez; Gaelle Bourout; Valerie Sinniger	Email re Roquette/SPI issues.	A/C
RF P163-165	07/13/2006	Gaelle Bourout	Bruno Quenon; Veronique Thelliez; Andrew Patch; Douglas Rigler; Therese-Marie Beaussart-Charlet; Didier Boulinguez; Valerie Sinniger; Emmanuelle Renard; Sylvie Soupramaniane; Valerie Fortier	Email re Roquette/SPI issues.	A/C; WP
RF P166-171	07/13/2006	Bruno Quenon	Veronique Thelliez; Andrew Patch; Douglas Rigler; Therese-	Email re Roquette/SPI issues.	A/C; WP

A/C = Attorney Client Communication;  
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			Marie Beaussart-Charlet; Didier Boulinguez; Valerie Sinniger; Emmanuelle Renard; Sylvie Soupramaniane; Valerie Fortie Gaelle Bourout		
RF P172-173	07/14/2006	Douglas Rigler	Gaelle Bourout; Bruno Quenon; Veronique Thelliez; Andrew Patch; Therese-Marie Beaussart-Charlet; Didier Boulinguez; Valerie Sinniger; Emmanuelle Renard; Sylvie Soupramaniane; Valerie Fortier	Email re Roquette/SPI issues.	A/C; WP
RF P174-179	07/17/2006	Gaelle Bourout	Quenon; Veronique Thelliez; Andrew Patch; Douglas Rigler; Therese-Marie Beaussart-Charlet; Didier Boulinguez; Valerie Sinniger; Emmanuelle Renard; Sylvie Soupramaniane; Valerie Fortier	Email re Roquette/SPI issues.	A/C; WP
RF P180-184	08/23/2006	Douglas Rigler	Didier Boulinguez; Gaelle Bourout; Bruno Quenon; Veronique Thelliez	Email re Roquette/SPI issues.	A/C; WP
RF P185-186	08/24/2006	Emmanuelle Renard	Douglas Rigler; Didier Boulinguez	Email re Roquette/SPI issues.	A/C; WP
RF P187-189	08/28/2006	Emmanuelle Renard	Bruno Quenon; Didier Boulinguez	Email re Roquette/SPI issues.	A/C; WP
RF P190	08/28/2006	Bruno Quenon	Jean-Marc Willefert; Edouard Roquette; Jean-Jacques	Email re discussions with attorney.	A/C; WP

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**ROQUETTE FRÈRES v. SPI PHARMA, INC. et al.**  
U.S.D.C. – D. Delaware C.A. No. 06-540 (\*\*\*)

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			Caboche; Jacques Pellerin; Patrick Benet; Johnny Pallot		
RF P191-193	08/30/2006	Bruno Quenon	Didier Boulinguez; Emmanuelle Renard; Veronique Thelliez	Email re Roquette/SPI issues.	A/C; WP
RF P194	08/30/2006	Didier Boulinguez	Douglas Rigler; Bruno Quenon; Veronique Thelliez; Emmanuelle Renard; Valerie Sinniger	Email re Roquette/SPI issues.	A/C; WP
RF P195-197	10/19/2004	C. Dehaene	Didier Boulinguez; Johnny Pallot; Bruno Quenon; Veronique Scelles	Letter re Roquette/SPI issues.	A/C; WP
RF P198	10/29/2004	Bruno Quenon	Didier Boulinguez; Valerie Sinniger	Email re Roquette/SPI issues.	A/C
RF P199-200	11/04/2004	Didier Boulinguez	Bruno Quenon; Veronique Scelles; Valerie Sinniger; Carole Bonvarlet	Email re Roquette/SPI issues.	A/C; WP
RF P201-203	11/09/2004	Didier Boulinguez	Bruno Quenon; Veronique Scelles; Julie Mazerats	Email re Roquette/SPI issues.	A/C; WP
RF P204	11/16/2004	Veronique Scelles	Sergio Neves; Denis Simon; Jean-Pierre Lecocq; Patrick Lapointe; Bruno Quenon	Email re discussions with attorney.	A/C; WP
RF P205	11/19/2004	Bruno Quenon	Patrick Lapointe; Johnny Pallot; Sergio Neves; Veronique Scelles	Email re discussions with attorney.	A/C; WP
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RF P208	02/28/2002	C. Dehaene	J. Pallot; B. Quenon; V. Scelles	Note re discussions with attorney.	A/C; WP

A/C = Attorney Client Communication;  
WP = Work Product

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RF P210-212	04/05/2002	Bruno Quenon	Bertrand Dufour; Jean-Marc Willefert; Pierre-Xavier Lemaire; Hubert Dupas; Patrick Benet; Jean-Jacques Caboche; Johnny Pallot	Email re Roquette/SPI issues.	A/C; WP
RF P213	04/17/2002	Bruno Quenon	Patrick Benet	Email re Roquette/SPI issues.	A/C; WP
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RF P222-223	10/03/2002	Bruno Quenon	John Fratus; Lori Hale; Edouard Roquette; Hubert Dupas; Pierre-Xavier Lemaire; Patrick Benet	Email re Roquette/SPI issues.	A/C; WP
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